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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 08 2009

SRC 07 800 26747

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

In this decision, the term "prior counsel" shall refer to [redacted] who represented the petitioner at the time the petitioner filed the petition. The term "counsel" shall refer to the present attorney of record.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner describes himself as a "researcher/physician." At the time he filed the petition, the petitioner was a research associate at the Feinstein Institute for Medical Research, Manhasset, New York. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel requested two extensions, stating: "A critical item of evidence is a letter of recommendation from an expert clarifying [the petitioner's] qualifications and experience. It has not been prepared or signed. Allowing us an additional 6 weeks would be a sufficient amount of time to ensure all the additional evidence is retrieved." The AAO allowed the petitioner until May 18, 2009 to supplement the record.

Subsequently, the petitioner submitted various exhibits and a letter from counsel, but no new letter matching counsel's description above. We note that counsel did not identify the "expert." Therefore, it is not clear whether the petitioner had a particular expert in mind, or simply desired more time in order to identify and locate such a witness.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –

> (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute,

aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on July 31, 2007. In a statement accompanying the initial submission, prior counsel stated:

> Throughout his research career, [the petitioner] has continuously generated significant contributions to his field of medicine at an important fundamental level with critical national and international implications to design and develop safer, accurate and more effective technologies for the medical, technological, communications, information, electronics, and security industries. . . .
>
> Most recently, [the petitioner] has been working on a project involving kidney ischemia-reperfusion injury, a condition that occurs when blood flow to the kidney is temporarily impinged or completely cut-off. This injury is the most common cause of kidney failure in hospitalized patients. . . . The goal of [the petitioner's] research on this project is to discover and develop new treatments which can reduce these injuries, thus saving the kidneys of those at risk. This work is of great importance because there is currently no effective treatment available to manage the condition.

The petitioner's initial submission contained copies of a "[p]aper under review . . . for publication" and a "[m]anuscript ready for submission," but gave no indication that anything by the petitioner had actually been published.

The petitioner submitted five witness letters, all from individuals involved in the petitioner's training. [redacted] of the Medical College of Wisconsin (MCW) stated:

> I first met [the petitioner] in December 2002, when he interviewed for a position in the internal medicine residency program. . . . [He] returned in 2003 to start his internal medicine training here at Milwaukee, Wisconsin. . . .[The petitioner] was by far one of our very best internal medical residents.
>
> . . . [The petitioner] is currently a research associate at the Feinstein Institute for Medical Research . . . studying acute kidney injury caused by ischemia-reperfusion injury. . . . He is . . . using novel drugs to control inflammation in the kidney during experimental kidney ischemia-reperfusion injury. So far he has been able to reduce the degree of damage during this intervention. This positive result will likely lead the way for a clinical trial in the near future.

[redacted] stated:

> [The petitioner] initiated two kidney-related clinical research projects during his residency training. The first one, entitled "Assessment of knowledge in patients with end-stage renal disease treated with hemodialysis," was conducted under the direction of my colleague, [redacted]. . . . In that study [the petitioner] was able to delineate the relationships between racial, educational, and social background and how well patients understood their dialysis treatment. With his findings, he was able to inform caregivers . . . on how best to educate their hemodialysis patients in order for them to understand their treatments and to improve compliance with treatment. The second project entitled "Trends in progression of chronic kidney disease in adults from 1990-2005," was undertaken under my supervision. This study looks at how the incidence of chronic kidney disease has changed over the 15 years with regards [*sic*] to new treatments for chronic diseases which give rise to kidney disease like hypertension and diabetes. . . . He was, without question, one of the very best of our medical residents.

[redacted] named in [redacted] letter, described the same two projects and asserted that the petitioner "is establishing himself as a formidable physician-scientist [who] is currently conducting innovative research using molecular biology techniques."

Neither of the studies described above appears to have involved innovation in the actual treatment of kidney disease. Rather, the first study focused on patient understanding of treatment, while the second was a survey of disease incidence over a fixed historical period.

[redacted] at the Feinstein Institute, stated:

> [The petitioner] was accepted into the Feinstein Institute graduate school to pursue his Ph.D. soon after starting as a research associate at our Institute. I am his mentor and also serve on his thesis committee. He came to us with significant clinical experience and skill combined with an excellent academic record. . . .
>
> [The petitioner] is trying to find treatments which can reduce [kidney ischemia-reperfusion] injuries and preserve the integrity of the kidney. . . .
>
> Since [the petitioner] has already become an integral member of our lab as a researcher, it would be highly impractical and harmful to replace him with another scientist with the same minimal qualifications. More importantly, he is currently in the middle of our unique Ph.D. program designed specifically for scientists with his particular talents – in this respect, he absolutely cannot be replaced.

[redacted] of the Feinstein Institute, repeated the assertion that "it would be almost impossible to find a suitable replacement" for the petitioner, and that to attempt to do so would "jeopardize [the] research" described above.

The director denied the petition on January 8, 2009, stating that the petitioner had not submitted objective, documentary evidence to show that an exemption from the job offer/labor certification requirement would serve the national interest. The director acknowledged that witnesses had seen promise in the petitioner's research abilities, but found no indication that the petitioner's past research has already had an effect on the field sufficient to justify a waiver.

On appeal, counsel states: "A review of the evidence should have indicated to the Service the past 'broad implementation' of [the petitioner's] research into the field." Counsel then discusses several exhibits, almost all of which are submitted for the first time on appeal. Counsel fails to explain how this evidence "should have" influenced the director's decision even before that evidence was submitted.

Counsel notes the publication of an article by the petitioner in *Kidney International* and states that the petitioner's article "is so significant it has been highlighted by other researchers in the field." To support these claims, the petitioner submits copies of three articles that cite his published work. All of these articles (including the petitioner's article in *Kidney International*) were published in 2008, well after the petition's July 2007 filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

Of the three submitted articles that cite the *Kidney International* article, one was written by four of the original article's five co-authors (including the petitioner himself). Self-citation of this kind is not indicative of wider influence, and the original article's authors are obviously not "other researchers in the field." Both of the remaining two articles were also written by researchers at the Feinstein Institute. The petitioner's co-author [redacted] was also a co-author of one of the citing papers. The citing articles submitted on appeal do not establish the petitioner's influence outside of the Feinstein Institute.

Counsel asserts that "leading experts in the field" provided letters in support of the petition. Without exception, these witnesses directly participated in the petitioner's professional training. Their assertions cannot directly establish the petitioner's wider influence in the field. We note that most of those witnesses asserted that the petitioner should receive the waiver because his departure from the Feinstein Institute would seriously disrupt research there and the petitioner would be impossible to replace.

It is an unconvincing argument to state that the petitioner requires permanent immigration benefits in order to complete his Ph.D. studies which are, by definition, temporary. As for the claim that the petitioner "absolutely cannot be replaced" at the Feinstein Institute, the record shows that the petitioner has already left the Feinstein Institute for a position at Brigham & Women's Hospital in Boston, Massachusetts. (A letter submitted on appeal shows that the hospital offered the petitioner "the position of Renal Fellow as of July 1, 2009.") Therefore, the petitioner, on appeal, has nullified one of his own principal arguments.

The petitioner is clearly valued by his collaborators and mentors. Nevertheless, we affirm the director's finding that the record contains nothing to show that the petitioner stands apart from his peers.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.